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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 739

STUART E. HERTZBERG, Trustee,
Petitioner,

vs.

ASSOCIATES DISCOUNT CORPORATION,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent prays that the Petition for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on December 1, 1959 be denied.

JURISDICTION

The Petitioner has failed to invoke, properly, the jurisdiction of this Court to review the issues presented by reason of the failure of the Petitioner to set forth in its Petition for Writ of Certiorari the date of the Judgment sought to be reviewed and the time of its entry, all as required by Rule 23 (b) (i) of the Supreme Court Rules.

Furthermore the Petition for Certiorari should be denied by reason of the fact that Rule 19 of the Supreme Court Rules provides that a review on a Writ of Certiorari will be granted only where there are special and important reasons therefor. The Michigan Statute in this case, namely Michigan Compiled Laws, 1948, Sec. 566.140, as amended by Public Laws of 1956, Act 153; M.S.A. Sec. 26.929, was superseded effective September 27, 1957 by Public Law of 1957, Act 233, to allow 14 days to file *purchase money* chattel mortgages and has been again amended by Public Laws of 1959, Act 110, effective March 19, 1960, to allow 10 days within which to file *all* chattel mortgages. Therefore the alleged conflict between the Bankruptcy Act and the Michigan Statute relied upon by the Petitioner, which conflict the Respondent denies ever existed, was dissolved by the Act of the Legislature of the State of Michigan effective September 27, 1957, and the statute involved in this case was in fact only in existence from August 11, 1956 to September 27, 1957. Inasmuch as legislation has been enacted which corrects what the Petitioner claims to have been a conflict between the Bankruptcy Act and the Michigan Statute, the question raised by the Petitioner has become academic and while it may present an intellectually interesting problem, this Court does not sit to satisfy a scholarly interest in such issues nor does it sit for the benefit

of the particular litigants. Rice v. Sioux City Memorial Park Cemetery (1955), 349 U. S. 70, 75 S. Ct. 614; Magnum Import Co. v. Coty, (1923), 262 U. S. 159, 163, 43. S. Ct. 531, 532.

QUESTION PRESENTED FOR REVIEW

The question presented for review by the Petitioner is not raised by the record in this case. The Petitioner's statement of the question makes reference to Section 70 (e) of the Bankruptcy Act but neither the opinion of the District Court nor the Court of Appeals construed or applied this Section to the case.

The question presented for review by the Petitioner is distorted in that it fails to make clear that the Michigan Statute involved herein applies in all insolvency proceedings and not only in Bankruptcy proceedings, In re Perry (W.D. Mich. 1958), 157 F. Supp. 910, and in all such insolvency proceedings applies to *all* creditors.

REASONS FOR DENYING THE WRIT

For the reasons hereinbefore more fully stated, the Petition for a Writ of Certiorari should be denied because it fails, as required by the Rules of the Supreme Court, to set forth the date and time of entry of the judgment sought to be reviewed; fails to set forth special and important reasons for granting such Writ; and fails to present a question for review.

It is the contention of the Respondent that there is no conflict whatsoever between Section 70 (c) of the Bankruptcy Act and Act 153 of 1956 Michigan. The chattel mortgage of the Respondent was filed in the Office of the Wayne County Register of Deeds, the correct place of filing, on July 5, 1957. The Bankrupt filed a voluntary

Petition in Bankruptcy on January 2, 1958. Section 70 (c) of the Bankruptcy Act gives the Trustee the status of a creditor with a lien obtained by legal or equitable proceedings *as of the date of bankruptcy*. Lewis v. Manufacturer's National Bank of Detroit (CA 6th March 7, 1960), ... F2d ..... In re Herman Billings, (W.D. Mo. 1959), 176 F. Supp. 253; Since the chattel mortgage in question was duly filed in the manner and form required by state law, before the date of the filing of the Bankruptcy petition, Section 70 (c) has no application. In re Gibson (CA 6th 1933), 65 F 2d 921; In re Charles DiPierro (D.C. Maine 1958), 159 F. Supp. 497; In re Herman Billings, supra. Since under Section 70 (c) the Trustee's rights arise *as of the date of bankruptcy* and since the chattel mortgage herein involved was filed prior to such date, Section 70 (c) is not applicable to the facts in the instant case and since it is not applicable, Act 153 of the Michigan Statutes cannot under these facts be in conflict therewith.

The Petitioner contends that a state statute relating to the filing of chattel mortgages, which provides that a chattel mortgage, to be valid against creditors of the mortgagor, inter alia, shall be filed forthwith but that in the event of insolvency proceedings the chattel mortgage shall be valid against creditors of the mortgagor if filed within 14 days from the date of execution thereof, is in conflict with the Bankruptcy Act in that it discriminates against a Trustee.

The Respondent recognizes that the Federal Government has broad powers as regards bankruptcy by reason of Section 8, Article I of the Federal Constitution, but the validity of various types or kinds of transactions entered into by a bankrupt as against a Trustee or Receiver in Bankruptcy is controlled by state law with respect to in-

herent validity or invalidity of the transaction, necessity of recording and formal requirements, relative rights of creditors and the like. Holt v. Crucible Steel Co. (1929), 224 U. S. 262, 32 S. Ct. 414; Remington, Bankruptcy, (5th Ed.), Section 1759, Vol. 4, p. 534; 28 Ref. Jnl. 1954, No. 4, p. 120; 27 Ref. Jnl. 1953, No. 1, p. 29. To put it another way, whether a Trustee is entitled to such a status (of the ideal hypothetical creditor) and the conditions under which he may obtain it are Federal questions covered by the Bankruptcy Act, but the extent of the Trustee's rights, remedies and powers as a lien creditor, are measured by the substantive law of the jurisdiction governing the property in question. In re Wright Industries (E.D. Ohio 1950), 93 F. Supp. 58, 62; accord American Textile Printers Co., Inc. (D.C. N.J. 1957), 152 F. Supp. 901.

While Respondent admits that the Michigan Act in question is unique in that the period for the valid filing of chattel mortgages is different in cases involving insolvency proceedings than in other cases, nevertheless the Courts have consistently held that the question of the validity of filing of chattel mortgages, conditional sales contracts, et cetera, is governed exclusively by state law; is a power left to the States, and the Trustee or Receiver is bound by such state law whether it is favorable or unfavorable to him. Holt v. Crucible Steel Co., supra; In re Imperial Brewery Co. (CA 4th 1942), 127 F 2d 766; In re American Textile Printers Co., Inc., supra; In re Tobias (D.C. Mich. 1957), 150 F. Supp. 288; Dean vs. Fidelity Corporation of Michigan (D.C. Mich. 1949), 82 F. Supp. 710.

Stated in language which cannot be improved upon:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any

case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law. Congress has no power to declare substantive rules or common law applicable in a State whether they be local in their nature or general, be they commercial or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts." Erie Railroad Co. v. Tompkins (1938), 304 U. S. 64, 58 S. Ct. 817.

"In the absence of fraud or preferential transfer, the validity of a chattel mortgage is to be determined in accordance with the law of the State; and if under the State statute and decisions a mortgage is good as against creditors, it will be considered effective as against the Trustee in bankruptcy of the Mortgagor." Thompson v. Fairbanks (1905), 196 U. S. 516, 25 S. Ct. 306; Holt v. Crucible Steel Co., supra.

The Petitioner makes reference to and apparently rests his case heavily upon the decision of this Court in Moore v. Bay (1931), 284 U. S. 4, 52 S. Ct. 3. Unfortunately for the Petitioner, this case does not say what the Petitioner would like it to say. Moore v. Bay merely held a lien invalid against a creditor under State law is in a bankruptcy proceeding invalid as against all creditors who have allowable claims.

To put it conversely unless the lien was invalid by reason of State law, the lien was good against all creditors of the bankrupt, including the Trustee. This case is just another example of the fact that the Trustee is bound by the laws of the various States on the question of whether a lien is valid or invalid as to such Trustee.

CONCLUSION

Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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